84-856

No. _____

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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented for Review

Congress provided in the Communications Act of 1934 for the division of communications jurisdiction between the federal government and the states. The degree of federal jurisdiction depends on the extent of the common carriers' participation in interstate communications. "Connecting carriers," those involved in interstate communications solely through physical connection with the facilities of another carrier, are subject to only limited federal jurisdiction, 72 USC §152(b). Against this background, the question presented is:

Does the Federal Communications Commission have the statutory authority under the Communications Act of 1934 to require connecting carriers' subscribers to pay fees in accordance with its end user access charge plan?

Parties

Petitioner, the New York State Department of Public Service, incorporates by reference the parties to the proceeding before the U.S. Court of Appeals for the District of Columbia listed in the Petition for a Writ of Certiorari filed by the National Association of Regulatory Utility Commissioners (NARUC).

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NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,

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vs.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The New York State Department of Public Service (hereinafter "NYDPS") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit") entered on June 12, 1984. The Suggestion for Rehearing *en banc* of Intervenor, U.S. Telephone, Inc. and the Petition for Rehearing of said intervenor were denied on August 23, 1984.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia is attached as Appendix A to the National Association of Regulatory Utility Commission's (hereinafter "NARUC") Petition for a Writ of Certiorari and is reported at 737 F.2d 1095 (D.C. Cir. 1984). The Orders of the Court denying the Petition for Rehearing and the Suggestion for Rehearing *en banc* are attached hereto as Appendix A. The Federal Communications Commission's (hereinafter "FCC") access charge order is reported at 93 FCC 2d 241 (1983). Its order on initial reconsideration is reported at 48 Fed. Reg. 42, 984 (1983). Its order on further reconsideration is reported at 49 Fed. Reg. 7810 (1984). The NARUC filed one complete set of the FCC's orders with the clerk of this court on July 18, 1984.

Jurisdiction

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on June 12, 1984. A Rehearing and a Rehearing *en banc* were sought by Intervenor, U.S. Telephone, Inc. and were denied by the D.C. Circuit on August 23, 1984. This petition has been filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations

The full text of relevant statutory provisions are set forth in Appendix B.

Statement of the Case

Petitioner NYDPS adopts and incorporates by reference the Statement of the Case set forth by the NARUC in its Petition for Certiorari dated July 18, 1984. The NYDPS also makes the following additions to that statement.

In order to implement its plan of recovering interstate NTS costs through flat-rate charges, the FCC ordered the creation of the National Exchange Carriers Association (NECA) which, as its name suggests, was to represent the local exchange companies whose access facilities are used to complete interstate calls. The NECA was to file its own access tariff with the FCC in conformity with the Commission's access charge order.[1] Included in that tariff was to be a provision imposing the FCC-ordered flat-rate end user charge on the local exchange companies' customers (See the FCC's access charge order, 93 FCC 2d 241 (1983)).[2]

Petitioner NYDPS argued below that such assertion of jurisdiction by the FCC over local exchange companies was impermissible under Section 152(b)(2) of the Communications Act of 1934. In particular, the NYDPS pointed out that once divestiture of the Bell System took

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[1] Because of time constraints and because of doubt that the newly-formed NECA would be in a position to file a tariff by October 3, 1983, the initial tariff was to be prepared by AT&T. 93 FCC 2d at 336.

[2] As noted in the NARUC Petition for Certiorari at pp. 5-6, the FCC has since that time deferred implementation of the end user charges for residential and single-line business customers until June, 1985.

place,[3] the local exchange companies comprising the NECA would all be "connecting carriers" as defined in §152(b)(2) of the Communications Act of 1934. As such, they would be subject to only limited federal jurisdiction that would not extend to the imposition of a flat-rate end user charge on their customers.

The D.C. Circuit rejected this argument on June 12, 1984 when it issued its decision affirming the FCC's access charge orders in all major respects. By order of August 23, 1984, the D.C. Circuit denied both a Petition for Reconsideration of its June 12, 1984 decision and a Suggestion for Rehearing *en banc*.

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[3] The divestiture referred to is the reorganization ordered as a result of the antitrust consent decree between AT&T and the United States as set forth in the Modified Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff sub nom, Maryland v. United States*, 103 S. Ct. 1240 (1983).

REASONS FOR GRANTING THE WRIT

A. The FCC Lacks Jurisdiction To Impose An End User Charge On Local Exchange Companies' Customers.

1. Section 152(b)(2) of The Communications Act of 1934 Gives The FCC Only Limited Jurisdiction Over Connecting Carriers.

The Communications Act of 1934 created a federal agency, the Federal Communications Commission, charged with the responsibility of regulating wire and radio communications. In enacting this statute, Congress quite consciously endowed the new federal agency with considerably less regulatory authority *vis-a-vis* the states than its predecessor in telephone communications, the Interstate Commerce Commission, was thought to have. The framers of the 1934 act in particular sought to divide regulatory authority between the federal government and the states in a manner that rejected the application to communications regulation of the so-called "Shreveport Doctrine" enunciated by this Court in *Houston Ea t and West Texas Railway v. United States*, 236 U.S. 342 (1914). 78 Cong. Rec. S 8823 (daily ed. May 15, 1934). See also *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 437 U.S. 874 (1977) (hereinafter "NCUC II"). Under that doctrine, the ICC was permitted to assert jurisdiction over state railroad rates because they allegedly burdened interstate commerce.

Congress did not decide on this allocation of jurisdiction in a vacuum. At the time the 1934 act was being considered, there was very little interstate telephone business. 78 Cong. Rec. S 8822 (daily ed. May 15, 1934). The telephone system then, as now, was used primarily for intrastate calls. Since ninety-seven percent of all calls were intrastate, 78 Cong. Rec. H 10316 (daily

ed. June 2, 1934) the FCC was asserting essentially no jurisdiction over communications. Regulation was being left instead to the states. 78 Cong. Rec. S 8822 (daily ed. May 15, 1934).

Recognizing the inherently intrastate nature of the telephone business as well as the states' traditional regulatory role, Congress opted not to endow the federal communications regulator, the FCC, with unfettered jurisdiction. Thus, as the court correctly analyzed in NCUC II, Congress sought to deny to the FCC the kind of jurisdiction over local communications rates which the ICC was permitted by virtue of the Shreveport Doctrine to assert over local railroad rates. 552 F.2d at 1047.

Congress's mechanism for limiting the FCC's regulatory authority and reserving it instead to the states in Section 152(b). This Section states in pertinent part:

> Subject to the provisions of §301 of this title, nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier, or (2) any carrier engaged in intrastate or foreign communications solely through physical connection with the facilities indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . except that §§201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)-(4) of this subsection.

Thus, in §152(b), Congress varied the degree of federal jurisdiction with the extent of the carriers' involvement in interstate business. The continuum of federal versus state jurisdiction it set forth was the following. With respect to the Bell system, that is carriers that

performed both interstate and intrastate services, the FCC had jurisdiction over the carriers' interstate business and the states had jurisdiction over the carriers' intrastate business. With respect to the independent carriers, the so-called "connecting carriers," the FCC was only given authority to the extent that Sections 201-205 of the Act were made "applicable" to them.

2. The Local Exchange Companies On Whose Customers The FCC Seeks To Impose The End User Charge Are "Connecting Carriers".

When Congress enacted the 1934 Act, the telephone system it had before it consisted of the Bell system (AT&T and its subsidiaries) and a host of small, independent companies that were related to the interstate system, if at all, solely by virtue of their physical connection to carriers in that system. *Hearings on HR 8301,* 73rd Cong., 2d Sess. 239-40, 250-58 (1934). These independent companies, as Senator Clark, sponsor of the amendment that with modification[4] became Section 152(b) said were "entirely local affairs." 78 Cong. Rec. S 8846 (daily ed. May 15, 1934). And as Senator Dill explained, on the occasion of the introduction of Senator Clark's amendment, its adoption was consistent with the remainder of the bill because "its purpose is to accomplish that which we have tried to do throughout the bill that is, *to protect the independent companies.*" 78 Cong. Rec. S 8847 (daily ed. May 15, 1934) (emphasis added).

With divestiture, the nature of companies classified as connecting carriers has changed in some respects. No longer are these independent connecting carriers small,

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[4] The modification involved addition of the clause, discussed *supra*, making §§201-205 applicable to connecting carriers.

family-run operations, 78 Cong. Rec. S 8846 (daily ed. May 15, 1934), they include now all of the former Bell subsidiaries that performed local exchange service.

But the basic intrastate nature of these connecting carriers' business has not changed. In fact, under the terms of the antitrust consent decree incorporated in the MFJ, the local exchange companies are precluded from engaging in interstate business and have no relationship with interexchange carriers other than through the physical connection of their lines. 552 F.Supp. at 227.

Since by the terms of the consent decree, these local exchange companies cannot perform interexchange service and since AT&T no longer has the "power to control the functions of the [local exchange companies]" *Rochester Telephone Corporation v. United States*, 307 U.S. 125 at 145 (1938), these companies must be treated as connecting carriers under the terms of Section 152(b)(2) of the 1934 Act. As such, they are subject to only that degree of regulation by the FCC that the framers of the 1934 Act envisioned would apply to the independent telephone companies of the 1930's.[5]

3. The FCC's Jurisdiction Over Connecting Carriers Extends Only To Regulation Of Transactions Between Connecting Carriers And Interstate Carriers That Affect The Conduct Of Interstate Business.

As noted *supra*, the only jurisdiction given to the FCC over connecting carriers is that contained in the proviso in §152(b) making §§201-205 applicable to such carriers. Sections 201-205 authorize the FCC to ensure that an interstate system is maintained through physical

[5] While it might be argued that this change in the nature of the communications system warrants a change in the regulatory structure, as discussed *infra*, that is a matter for Congress, not this Court to decide.

connection (§201), that discrimination in the provision of communications service does not take place (§202), that tariffs are filed by interstate carriers (§203), that those filings are investigated (§204) and that just and reasonable rates are set (§205).

Under this regulatory scheme, with respect to access, the FCC can order connecting carriers to provide access to interstate carriers. *North Carolina Utilities Commission v. FCC*, 537 F.2d 287 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter "NCUC I"); *NCUC II, supra; Lincoln Telephone and Telegraph Company v. FCC*, 659 F.2d 1082 (D.C. Cir. 1981). It can set the rates that connecting carriers charge interexchange carriers for access to the local exchange. And it can take steps to insure that those rates are not discriminatory.[6] It has the authority to determine the rates that interexchange carriers must charge to insure that the interstate access costs are covered. And it has the authority to determine that the interstate carriers should recover those costs on a flat-rate basis if it so desires.

What it does not have the authority to do, however, is to order a connecting carrier to file a tariff, 47 U.S.C. §203, and to prescribe the rates that carrier charges its own customers. Yet, that is precisely what the FCC seeks to do here. Contrary to §203, the FCC is seeking to require local exchange companies, through the NECA, to file an access tariff and to dictate the end user rates in that tariff.

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[6] That is why, although connecting carriers are not obligated to file their tariffs with the FCC, the interexchange companies are required to include connecting carriers' tariffs in their own filings. This permits the FCC to investigate the connecting carriers' practices as they affect transactions with the interstate carriers.

The issue is not whether the FCC has unfettered jurisdiction to impose flat-rate as opposed to usage-sensitive charges for interstate toll service. It does. The issue is whether it can order intrastate companies to file tariffs containing end user rates dictated by the FCC. It cannot.[7]

Nonetheless the D.C. Circuit read Sections 201-205 to mean that the FCC had full, unfettered jurisdiction over the rates connecting carriers charged their own customers where those rates are designed to recover interstate costs. But such a reading of the statute is incorrect. Obviously, Congress intended the FCC to have *less* jurisdiction over the connecting carriers than it did over the Bell system. Otherwise, it would simply have made §152(b)(1), the provision denying the FCC jurisdiction over intrastate business, applicable to connecting companies as well.

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[7] In other words, the FCC's jurisdiction over connecting carriers stops before it gets to the door of the connecting carriers' customers. The FCC can regulate the terms of the transactions between interexchange and connecting carriers. It can determine what costs connecting carriers can recover for providing interstate carriers access to the local exchange. But, it cannot spare interexchange carriers (and their customers) from having to pay for these services by ordering the connecting carriers to cover the costs by charges to their own customers.

The D.C. Circuit below accepted the FCC's argument that by virtue of their having access to the interstate system (whether or not they actually used the system), all of the local exchange companies' customers were in fact interstate customers subject to FCC jurisdiction. But there is nothing in the legislative history to support such an expansive reading of the FCC's jurisdiction. Indeed, quite the contrary, if the FCC is correct, one wonders why Congress took such care to treat separately the FCC's jurisdiction over carriers "engaged in interstate or foreign communications solely through physical connection with the facilities of another carrier..." 47 U.S.C. §152(b)(2).

Congress's separate treatment of connecting carriers in Section 152(b)(2) must mean that even with respect to that aspect of a connecting carrier's operation that is *related* to the conduct of interstate business, *i.e.* the physical interface between the interstate facilities and the local exchange facilities, the FCC's jurisdiction is sharply limited. And such an interpretation is entirely consistent with the framers' perception that connecting carriers were self-contained intrastate units with the exception of those points at which they interfaced with interstate carriers. It was only those transactions between connecting and interstate carriers, occurring at the points of physical interconnection, which could have necessitated FCC jurisdiction because they had a direct bearing on the carriers' ability to provide interstate service.[8]

The D.C. Circuit below gave an overly broad reading to §§201-205, thereby violating the fundamental principle that " 'the federal-state balance' will not be disturbed unintentionally by Congress or *unnecessarily by the courts.*" *Jones v. Rath Packing Co.*, 430 U.S. 519 at 525 (1976) (emphasis added, citations omitted). Unless a clear and manifest intent of Congress to preempt the states is shown, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Jones v. Rath Packing Co., supra; Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), it is only those state practices not reconcilable with the

[8] With respect to the Bell system, however, because of the complex integration of its intrastate and interstate services, Congress obviously felt the FCC needed more complete jurisdiction over the interconnection transactions between the interstate and intrastate segments of the Bell system. Otherwise, through paper transactions, the interexchange carriers might be able to frustrate FCC regulation of interstate telephone business.

attainment of federal regulatory goals which must give way. Here, there is no clear and manifest intent of Congress to preempt the states in regulating the telephone rates their intrastate customers pay. To the contrary, the framers of the 1934 Act sought to protect the independent companies that provided local service to these customers. Nor is this an instance where federal and state practices cannot be reconciled. As noted *supra*, if the FCC needs to move to a flat-rate charge for interstate access services, it can do so without taking the draconian step of ordering intrastate exchange companies to collect interstate fees from their customers.

4. The Primary Cases Relied On By The Court Below Do Not Support The FCC's Assertion Of Jurisdiction To Impose End User Charges On Local Exchange Companies' Customers.

The primary cases relied on by the D.C. Circuit, *NCUC I* and *II* and *Computer and Communications Industry Association v. FCC*, 693 F.2d 1981 (D.C. Cir. 1982), *cert. denied*, _____ U.S. _____, 103 S. Ct. 2109 (1983) (hereinafter "Computer II") do not support the FCC's assertion of jurisdiction to impose end user charges on local exchange companies' customers.

NCUC I and *II* addressed the FCC's jurisdiction to set conditions governing the interconnection of terminal equipment to local exchange companies' lines and to the interstate telephone network. The Court of Appeals for the Fourth Circuit (Fourth Circuit) concluded that since terminal equipment was used for both interstate and intrastate calls and could not physically be severed, state regulation must yield to federal regulatory goals. It simply was not physically possible to have two different sets of rules for the interconnection of terminal equipment depending upon whether that equipment was used for interstate or intrastate calls. As the Fourth

Circuit in *NCUC II* said in explaining the rationale for its earlier decision in *NCUC I*, "[s]omething had to give." 552 F.2d at 1043.

In the instant case, nothing has to give. The separation of "local loop" costs between interstate and intrastate jurisdictions is a process that has been going on for at least fifty years in accordance with the requirements set forth in *Smith v. Illinois Bell*, 282 U.S. 133 (1930). Once the assignment of costs has been made, the FCC can determine how it wants the costs assigned to the interstate jurisdiction to be covered. Similarly, the states can determine how the intrastate costs are to be covered. One jurisdiction (the FCC) can decide to impose flat-rate, non-usage sensitve charges. Another (the states) can opt for just the opposite rate structure. But what neither can do is impose those costs on each other's ratepayers.

Computer II was also a case of the FCC asserting jurisdiction over non-severable physical facilities. The issue was whether the FCC could order the de-tariffing of customer premises equipment (CPE) on the federal as well as the state level. As the Court of Appeals for the Second Circuit pointed out in Computer II, "the federal-state conflict would stem as it did in the NCUC cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely." 693 F.2d at 216.[9]

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[9] It should be pointed out that Computer II did not even address the Commission's authority to exercise its Title II common carrier jurisdiction in the face of conflicting state regulations. Rather it addressed the Commission's authority to forego regulating under Title II versus the states' authority to continue similar regulations of their own. 693 F.2d at 207-208.

There is no unavoidable conflict in the instant case. If the FCC believes flat-rate charges, as opposed to usage-sensitive charges will accomplish its goal, it is free to order such a rate structure for its *own* interstate users. But under §203, it cannot order intrastate connecting companies to file a tariff, let alone dictate what charges that tariff must impose on the connecting carrier's local ratepayers.

B. This Case Is Of Critical National Importance Because The Statutory Framework Of Dual State-Federal Communications Regulation Is In Danger Of Being Made Meaningless In The Post-divestiture Environment.

Over the past ten years, the FCC has attempted to assume increasing jurisdiction over intrastate telecommunications practices. And it has done so despite the fact that Congress has adopted no amendments to change the statutory scheme of the Communications Act of 1934.

As noted *supra* in *NCUC I* and *II*, the FCC successfully sought to remove telephone company restrictions on the interconnection of non-carrier-supplied terminal equipment used in both intrastate and interstate calling; in *Computer II*, as discussed *supra*, the court upheld the FCC's authority to deregulate customer premises equipment by forbidding carriers from offering such equipment as part of transmission service; in *Puerto Rico Telephone Company v. FCC*, 553 F.2d 694 (1st Cir. 1977), the court upheld the FCC's determination that the Puerto Rico Telephone Company could not refuse to connect privately supplied private branch

exchange (PBX) equipment[10] to its telephone network; in *New York Telephone Company v. FCC*, 631 F.2d 1059 (2nd Cir. 1980), the court upheld FCC jurisdiction over charges for foreign exchange (FX)[11] and common control switching arrangement (CCSA)[12] services for intrastate customers.[13]

Such assertion of preemptive jurisdiction by the FCC took place in an environment where the integrated Bell system was the significant force in both interstate and intrastate markets. Whether the FCC's actions in that context represented an appropriate extension of federal jurisdiction over a major interstate actor or rather an impermissible revision of Congress' mandate to avoid application of the Shreveport Doctrine can be, and has been, debated at great length.

But the issues raised in the instant proceeding transcend that debate for three reasons. First, we are for the first time in the instant case faced with FCC preemption of the states' jurisdiction even though such preemption is not necessitated by incompatible state action. Second, we are for the first time faced with FCC

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[10] PBX systems are self-contained telephone systems used by a customer for internal communications (such as intra-office or intra-hotel systems) which contain switching capacity to link the customer's internal system with the rest of the telephone network.

[11] FX services permit the leasing of full-time point-to-point (*i.e.* dedicated) private line channels which permit a customer in one city to obtain local exchange service in another city without incurring a toll charge.

[12] With CCSA, a large customer with a network of private lines can dial all stations in the network or dial off-network through interconnections with local exchange services, FX or WATS lines.

[13] Just recently, in *Virginia State Corporation Commission v. FCC and United States of America*, 732 F.2d 388 (4th Cir. 1984), the Fourth Circuit upheld FCC jurisdiction to prescribe depreciation rates and methods for classes of property used by telephone companies. Petitions for *certiorari* are expected in this case as well.

preemption of state jurisdiction over *rates* paid by local exchange customers. And third, with divestiture, the nature of the telecommunications market has changed drastically such that the local exchange companies over whose customers the FCC seeks to assert jurisdiction are no longer affiliated with an integrated, interstate telecommunications concern.[14]

In all of the cases cited above, the court found that incompatible state regulation necessitated federal preemption. Here, in the absence of any incompatible state regulation, the FCC nevertheless asserted jurisdiction over intrastate companies. And it did so to an unprecedented degree because it sought to impose a fee directly on local customers. In none of the cases referred to above did the FCC assert jurisdiction over the rates paid by customers of local exchange companies.

Not only does the FCC seek to extend its authority in this case in an unprecedented manner, over the rates paid by local companies' customers, it chooses to do so at the same time that the local exchange companies are no longer simply local subsidiaries of a single homogenous interstate network. By virtue of the antitrust consent decree, they are now totally independent of that network except for the fact that their physical facilities connect with those of interstate carriers. They are in the exact same position as the independent telephone companies which Congress decided in 1934 should be subject to only limited federal jurisdiction. Until Congress amends the Communications Act of 1934, which is certainly its prerogative, they should be regulated as such.

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[14] In many of the same respects, the Fourth Circuit's recent decision in the *Virginia State Corporation Commission* case represents a similarly significant departure from past precedents.

Conclusion

For the reasons set forth herein, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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DATED: November 20, 1984

APPENDIX A

Order Denying Suggestion for Rehearing *en banc*

United States Court of Appeals
For the District of Columbia Circuit
Filed Aug 23 1984
George A. Fisher
Clerk

Received
Aug 28 19____
Public Service Commission
Office of Counsel

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 83-1225.
September Term, 1983.

National Association of Regulatory
Utility Commissioners,

Petitioner,

v.

Federal Communications Commission
and United States of America,

Respondents.

Ad Hoc Telecommunications Users Committee *et al.*,

Intervenors.

And Consolidated Cases

Appendix A—Order Denying Suggestion for Rehearing en banc.

BEFORE: Robinson, *Chief Judge;* Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, *Circuit Judges,* and MacKinnon, *Senior Circuit Judge*

ORDER

The Suggestion for Rehearing *en banc* of Intervenor, U.S. Telephone, Inc. has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*
BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wright, Wald, Edwards, Scalia and Starr did not participate in this order.

Order Denying Petition for Rehearing

United States Court of Appeals
For the District of Columbia Circuit
Filed Aug 23 1984
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
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Federal Communications Commission
and United States of America,

Respondents.

Ad Hoc Telecommunications Users Committee *et al.*,

Intervenors.

And Consolidated Cases

BEFORE: Wilkey and Ginsburg, *Circuit Judges*, and
MacKinnon, *Senior Circuit Judge*

Appendix A—Order Denying Petition for Rehearing.

ORDER

On consideration of the Petition for Rehearing of Intervenor U.S. Telephone, Inc. filed July 23, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*
BY: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

Statutory Provisions

STATUTES & REGULATIONS

47 U.S.C. §152(b)

(b) Except as provided in section 224 of this title and subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

(As amended Feb. 21, 1978, Pub.L. 95-234, §5, 92 Stat. 35.)

Appendix B—Statutory Provisions.

47 U.S.C. §201

§201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not

contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, §201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

47 U.S.C. §202

§202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, §202, 48 Stat. 1070; Sept. 13, 1960, Pub.L. 86-751, 74 Stat. 888.

47 U.S.C. §203

§203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require. June 19, 1934, c. 652, Title II, §203, 48 Stat. 1070

(b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(As amended Aug. 4, 1976, Pub.L. 94-376, §1, 90 Stat. 1080.)

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation of order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, §203, 48 Stat. 1070.

47 U.S.C. §204

§204. Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the

proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

(As amended Aug. 4, 1976, Pub.L. 94-376, §2, 90 Stat. 1080.)

Appendix B—Statutory Provisions.

47 U.S.C. §205

§205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. June 19, 1934, c. 652, Title II, §205, 48 Stat. 1072.